

Date: August 15, 1996
Case No.: 94-INA-627

In the Matter of:

AERIAL TOPOGRAPHIC MAPS
Employer

On Behalf Of:

CEASAR A. LOMELI-RODRIGUEZ,
Alien

Appearance: James L. Rosenberg, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis, and Vittone
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 8, 1993, Aerial Topographic Maps ("Employer") filed an application for labor certification to enable Cesar Armando Lomeli-Rodriguez ("Alien") to fill the position of Photogrammetric Engineer (AF 20). The job duties for the position are:

The occupant of this position will be required to plan and coordinate activities (sic) concerned with conducting aerial surveys. Will prepare and analyze topographic materials from areal (sic) photographs and survey objectives. Determine the appropriate and economic method to conduct and fulfill customer orders. Remand plans for grounds surveys outlining guide lines, measuring points and shapes. Prepare and interpret data to determine topographic features. Conduct research involving aerial photography and ground surveys to improve techniques.

The requirements for the position are a Bachelor's Degree in Civil Engineering and three years of experience in the job offered. Other Special Requirements are that a resume is required.

The CO issued a Notice of Findings on April 26, 1994 (AF 16), proposing to deny certification on the grounds that the Employer's business is nonexistent in violation of 20 C.F.R. § 656.3, and the Employer is not able to place the Alien on the payroll before the date of his proposed entrance into the United States in violation of § 656.20(c)(4). The CO based his findings on information provided by the California Employment Development Department (EDD), which shows that the owner filed for Chapter 11 Bankruptcy on May 11, 1993, and the last employee was laid off on April 22, 1993. The CO noted that the owner wrote a letter to the

¹ All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

EDD on August 27, 1993, after the application was filed, requesting that his account be inactivated because he had no payroll and did not anticipate having any more payroll. The CO also noted that the application shows the Alien resides in Mexico, and his work history shows he had employment in Mexico from November 1983 to December 1989, but that EDD information shows the Alien has been residing in California since 1987.

In its rebuttal, dated June 29, 1994 (AF 4), the Employer's Attorney contended that, "[c]urrently the economic climate has greatly improved, and the demand for the employers [sic] services has increased considerably. The employer has received over 25 requests for job orders. As a result the employer has filed for its EDD tax number." The Employer stated that during the economic work decrease, the Employer performed the duties by hiring outside personnel to work on an independent contractor basis, that he currently has no employees, but "now that numerous orders are being received the employer must start up his operation as before. The Employer gave the Alien's address in Torrance, California, and gave the Alien's work history as 1983 to 1987 a construction job in Mexico, and "1987 to present - various part-time employment." The Employer stated that the Alien is currently employed "as an independent contractor for various employers. The employment is not full time or regular, it is on an as needed basis."

The CO issued the Final Determination on July 14, 1994 (AF 2), denying certification because the Employer failed to adequately document that there is an on-going business and an unfilled job opening currently exists in violation of §§ 656.3 and 656.20(c)(4).

On August 9, 1994, the Employer requested review of the denial of labor certification (AF 1). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

In the NOF, the CO notified the Employer to submit copies of the firm's business license and registration with the State of California as a tax-paying entity (AF 17). In rebuttal, the Employer did not submit either of these two documents despite an extension of 30 days by the CO. The Employer stated that it had filed for a state EDD tax number, but even if documented, this fact would not establish a *bona fide* job opening or a current business.

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 87-INA-659 (Jan. 13, 1989) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO will result in the denial of certification, *Edward Gerry*, 93-INA-467 (June 13, 1994); *STLO Corporation*, 90-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 88-INA-40 (July 5, 1988), especially where the employer

does not justify its failure. *Vernon Taylor*, 89-INA-258 (Mar. 12, 1991).

While the Employer has made assertions that it now has a viable business, it has provided no documentation to support the assertion, and such unsupported assertions cannot carry the Employer's burden of proof. See *Our Lady of Guadalupe School*, 88-INA-313 (June 2, 1989).

The Employer also implied that its business was expanding and it recently received 25 new orders. However, that statement is unsupported by any documentation, and the Employer has not shown that any business expansion is documented, detailed, definite, and credible. See *Guyen Fine Jewelry*, 92-INA-52 (Aug. 31, 1993). There is also no evidence in the record that establishes that the Employer has the funds to place the Alien on the payroll prior to his entering the U.S.

We find that the Employer has failed to produce reasonably requested documents, and has failed to adequately document that a current job opening exists, and that it has sufficient funds to place the Alien on the payroll. The CO's denial of labor certification was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the ____ day of August, 1996, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk

***Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.